STATE OF SOUTH CAROLINA COUNTY OF RICHLAND	)))	IN THE COURT OF COMMON PLEAS FIFTH JUDICIAL CIRCUIT
Richard A. Harpootlian, Plaintiff, v. South Carolina Senate Republican Caucus, Defendant.		C/A No.: 2018-CP-40-05370 **PRELIMINARY INJUNCTION**

This matter is before the Court on a petition and motion for a preliminary injunction filed by Plaintiff Richard A. Harpootlian against Defendant South Carolina Republican Senate Caucus. For the reasons that follow, Harpootlian's motion is **GRANTED** and the Republican Senate Caucus is enjoined and **ORDERED** to:

> (a) cease and desist in purchasing or placing any further ads relating to the special election or the candidates running for state Senate District 20, and
>
> (b) contact all television stations, cable networks, Internet companies, email companies, direct mail companies, telephone vendors, or any other advertising services with whom the Senate Republican Caucus has made or placed expenditures relating to state Senate District 20 and suspend dissemination of those communications.

This preliminary injunction shall remain in place until dissolution, entry of final judgment, or further order of the Court. In issuing this preliminary injunction, the Court makes the following findings of fact and conclusions of law.

FINDINGS OF FACT

Having carefully considered and weighed the evidence in this case, including exhibits and testimony offered by the parties, the Court makes the following findings of fact by the preponderance of the evidence:

1. There is a special election for state Senate District 20 scheduled for Tuesday, November 6, 2018. The Democratic Party's nominee is the Plaintiff, Dick Harpootlian. The Republican Party's nominee is Benjamin Dunn.

2. The Senate Republican Caucus is comprised of the Republican members of the South Carolina Senate. The leader of the Senate Republican Caucus is Senator Shane Massey, who holds the position of majority leader.

3. On Friday, October 12, 2018, Plaintiff filed a verified petition and motion for a preliminary injunction, complaint for declaratory and injunctive relief, and motion to expedite discovery. Due to the chief administrative judge's unavailability to consider Plaintiff's request for an expedited hearing, the matter was referred to this Court.

4. That same day, the Court issued an order convening an emergency hearing on Plaintiff's motion for a preliminary injunction for Monday, October 15, 2018 at 2:00 p.m. The Court also granted Plaintiff's discovery request for all invoices for expenditures made relating to state Senate District 20 and exemplars of those expenditures.

5. The Court convened a plenary hearing on October 15.

6. The parties stipulated to the admissibility of 16 exhibits introduced by the Plaintiff, specifically: two ads running on television and Facebook (Ex. 1); a printed mailer (i.e., direct mail) sent to a District 20 voter (Ex. 2); quarterly reports from January 10, 2017 through October 10, 2018 filed by the Senate Republican Caucus with the South Carolina Ethics Commission (Ex. 3); and reports from four local television stations concerning ads placed by the Senate Republican Caucus (Exs. 4–16).

7. Plaintiff also presented testimony from state Senator Shane Massey who testified he is the Senate Republican Caucus's majority leader and the person responsible for authorizing

the communications at issue in this case. Concerning the Court's discovery order Senator Massey produced copies of invoices reflecting the caucus's spending in the District 20 special election to date and testified that all exemplars of the Caucus's communications with voters had already been filed or admitted into evidence.

8. Senator Massey testified one of the Republican Senate Caucus's objectives is political, namely to add to its membership or, in the case of District 20 which was previously held by a Republican Senator, not lose members.

9. He also agreed that the purpose of the television and Facebook ads and direct mail was to support Mr. Dunn's election and, by extension, Plaintiff's defeat.

10. Further, Senator Massey conceded the caucus has already spent in excess of $5,000 to support Mr. Dunn's candidacy, but when pressed could not offer an exact amount.

11. The Court has reviewed the invoices furnished by the caucus (Ex. 17) which total $198,242.10 *excluding* the three $5,000 contributions the Republican Senate Caucus made directly to Mr. Dunn's campaign. This figure is in line with the television ad-buy reports (Exs. 4–16), which together reflect $135,355 in television advertising (only counting the "revised" buy reflected in Exs. 4 and 5 once).

12. Senator Massey agreed that, as of October 10, 2017, the Senate Republican Caucus had in excess of $800,000 cash on hand in the caucus's "operating account" and that he could authorize the caucus to spend every penny in District 20 (subject to possible protestation of caucus colleagues).

13. He explained that the Senate Republican Caucus's spending in District 20 occurred from the caucus "campaign account," which he conceded was funded by the transfer of, at times,

hundreds of thousands of dollars from the operating account. Those fund transfers are detailed in the caucus' Ethics Commission disclosures (Ex. 3).

CONCLUSIONS OF LAW

In granting Plaintiff's motion for a preliminary injunction, the Court makes the following conclusions of law:

14. Rule 65 of the civil rules provides that no temporary injunction shall be issued without notice to the adverse party. Rule 65(a), SCRCP. "A preliminary injunction should issue only if necessary to preserve the status quo ante, and only upon a showing by the moving party that without such relief it will suffer irreparable harm, that it has a likelihood of success on the merits, and that there is no adequate remedy at law." Poynter Invs., Inc. v. Century Builders of Piedmont, Inc., 387 S.C. 583, 586–87, 694 S.E.2d 15, 17 (2010).

15. Plaintiff argues the Senate Republican Caucus's spending on Mr. Dunn's behalf exceeds the $5,000 limit imposed by South Carolina Code § 8-13-1316(A) and that, absent an injunction, he has been and will continue to be irreparably by further dissemination of caucus' communications, which Plaintiff argues "will inhibit the conduct of a fair, lawful electoral process." *See* Pl.'s Pet. ¶ 21.

16. The Court agrees that, if correct, campaign spending in excess of the legal limit constitutes an irreparable harm for which there is no adequate remedy at law. *See* S.C. Code Ann. § 8-13-530(5) (noting that 50-days prior to an election, any person may petition the court of common pleas alleging the violations complained of and praying for appropriate relief by way of mandamus or injunction, or both[,]" and that the alleged violation "must be considered to be an irreparable injury for which no adequate remedy at law exists.").

17. Accordingly, the Court turns to the merits of this dispute and concludes Plaintiff is likely to prevail on the merits of his claim.

18. The South Carolina Ethics Act provides, in relevant part, that within an election cycle, "a political party through its party committees or *legislative caucus committees* may not give to a candidate contributions which total in the aggregate more than: … (2) five thousand dollars in the case of a candidate for any other office." S.C. Code Ann. § 8-13-1316(A).

19. A "legislative caucus committee" includes, in relevant part, "a committee of either house of the General Assembly controlled by the caucus of a political party[.]" *Id.* § 8-13-1300(21)(a).

20. There is no dispute the Senate Republican Caucus is a "legislative caucus committee" within the meaning of § 8-13-1300(21).

21. A "contribution" within the meaning of the Ethics Act, includes in relevant part, an "*in-kind contribution or expenditure* … or anything of value made to a candidate or committee to influence an election[.]" S.C. Code Ann. § 8-13-1300(7) (emphasis added). Likewise, an "expenditure" under the Act is any "purchase, payment, loan, forgiveness of a loan, an advance, in-kind contribution or expenditure, a deposit, transfer of funds, gift of money, or anything of value for any purpose." *Id.* § 8-13-1300(12). Further, an "in-kind contribution or expenditure" is defined as "goods or services which are provided to or by a person at no charge or for less than their fair market value." *Id.* § 8-13-1300(20).

22. By way of example, Senator Massey testified that, as a senate candidate, a supporter could not spend $10,000 to host a fundraiser for his campaign without violating the $1,000 per individual, per campaign cycle limitation on candidates for the South Carolina Senate. *See id.* § 8-13-1314(A).

23. Plaintiff argues the Senate Republican Caucus is making in-kind contributions or expenditures on Mr. Dunn's behalf in violation of the $5,000 limit on caucus contributions imposed by § 8-13-1316(A). The Court agrees.

24. However, the Senate Republican Caucus does not agree and offered several arguments in defense of caucus spending.

25. First, the caucus points to two cases: *S.C. Citizens for Life, Inc. v. Krawcheck*, 759 F. Supp. 2d 708 (D.S.C. 2010) (*Krawcheck I*) and *South Carolinians for Responsible Government v. Krawcheck*, 854 F. Supp. 2d 336 (D.S.C. 2012) (*Krawcheck I*). The Senate Republican Caucus reads *Krawcheck I* and *Karwcheck II* for the proposition that its spending is no longer constrained by the Ethics Act because the federal courts have struck down the definition of "committee" under § 8-13-1300(6) as unconstitutionally broad.

26. Second, the caucus points to § 8-13-1300(7) (defining "contribution") and § 8-13-1300(31) (defining "influence the outcome of an elective office"), which the caucus reads together to allow unlimited campaign expenditures on behalf of its party nominee within the 45-day pre-election period.

27. Third, the caucus argues its conduct is authorized by an opinion issued by the South Carolina Senate Ethics Committee: Advisory Opinion 2007-1 (July 23, 2007).

28. The Court disagrees for reasons it will address in turn.

29. In *Krawcheck I*, a non-profit corporation seeking to disseminate factual information on human fetal development, abortion, abortion alternatives, and related issues challenged the Ethics Act's definition of the "committee"—codified at § 8-13-1300(6)—as unconstitutionally broad under the First Amendment. *Krawcheck I*, 759 F. Supp. 2d at 709–10.

30. Specifically, the corporation sought to spend approximately $15,000 to disseminate a "voter guide" via direct mail to voters in a state house district in advance of a general election. *Id.* at 711. The corporation argued (1) the term "committee" in § 8-13-1300(6) was facially unconstitutional for overbreadth; (2) the term "influence" in § 8-13-1300(31)(c) was facially unconstitutional for overbreadth; and (3) the term "influence" in § 8–13–1300(31)(c) was facially unconstitutional for vagueness. *Krawcheck I*, 759 F. Supp. 2d at 711–12. The district court granted summary judgment in the corporation's favor concluding "the definition of 'committee' located at S.C. Code Ann. § 8–13–1300(6) is facially invalid on the ground that the definition is unconstitutionally overbroad." *Id.* at 720.

31. Looking primarily to the U.S. Supreme Court's decision in *Buckley v. Valeo*, 424 U.S. 1 (1976) and the U.S. Court of Appeals for the Fourth Circuit's decision in *North Carolina Right to Life Inc. v. Leake*, 525 F.3d 274 (4th Cir. 2008), the *Krawcheck I* Court reasoned the Ethics Acts' definition of "committee" was unconstitutional because the regulatory mandates that accompanied "committee" status under the Ethics Act applied to groups like the corporation, it burdened more speech than what the First Amendment allowed. *See Krawcheck I*, 759 F. Supp. 2d at 712–20.

32. In *Buckley*, the Supreme Court upheld a campaign contribution restriction imposed by the Federal Election Campaign Act of 1971 (FECA), holding the FECA's purpose "to limit the actuality and appearance of corruption resulting from large individual financial contributions" was a sufficiently weighty interest capable of justifying the FECA's limited restraint on speech. *See Buckley*, 424 U.S. at 26–29. The Court reasoned,

> To the extent that large contributions are given to secure a political quid pro quo from current and potential office holders, the integrity of our system of representative democracy is undermined. Although the scope of such pernicious practices can never be reliably

> ascertained, the deeply disturbing examples surfacing after the 1972 election demonstrate that the problem is not an illusory one.

Buckley, 424 U.S. at 26–27; *see also Citizens United v. FEC*, 558 U.S. 310, 344 (2010) (striking down a prohibition on corporate independent expenditures, while explaining *Buckley's* decision upholding contribution limits to candidates turned on "the potential for quid pro quo corruption [that] distinguished direct contributions to candidates from independent expenditures.").

33. In *Leake*, the Fourth Circuit's sought to apply *Buckley's* strictures by discerning whether the organization at issue was primarily engaged in regulable, election related speech. *See Leake*, 525 F.3d at 287–88.

34. As the Fourth Circuit's decision in *Leake* explained, *Buckley's* holding "is based on the recognition that 'only unambiguously campaign related communications have a sufficiently close relationship to the government's acknowledged interest in preventing corruption to be constitutionally regulable.'" *Krawcheck I*, 759 F. Supp. 2d at 714 (quoting *Leake*, 525 F.3d at 281).

35. Thus, the district court's decision striking down the Ethics Act's definition of "committee" in *Krawcheck I* expressly recognized "that legislatures have the well established power to regulate elections," by enacting campaign finance restrictions on political campaigns; but was instead concerned with limits on *ordinary* political expression outside an election context. *See Krawcheck I*, 759 F. Supp. 2d at 714 (quoting *Buckley*, 423 U.S. at 13–14 & 80 and *Leake*, 525 F.3d at 281). Further, the court reasoned the corporation's challenge to the term "influence" was "no longer viable" based on its ruling striking down the term "committee," but went on to conclude "that South Carolina's attempt to define the scope of communications that may be susceptible to some level of regulation does not contain an inherent constitutional infirmity." *Krawcheck I*, 759 F. Supp. 2d at 721–28.

36. Two years later, another member of South Carolina's District Court agreed the definition of "committee" under § 8-13-1300(6) was unconstitutionally broad in response to a facial challenge by a nonprofit organization seeking to communicate with citizens about cutting taxes and school choice. *See Krawcheck II*, 854 F. Supp. 2d at 337–338 & 344 (granting summary judgment on claim "for a declaration that, on its face, the South Carolina Ethics Code's definition of 'committee' found in South Carolina Code § 8-16-1300(6) is overbroad and facially unconstitutional.").

37. Like *Krawcheck I*, the district court in *Krawcheck II* looked to *Buckley*, reasoning:

> The Supreme Court holds laws aimed at regulating political speech to be permissible only in the limited situation where the speech is "unambiguously related to the campaign of a particular ... candidate." *Buckley*[, 424 U.S. at 80]. An organization can be subjected to speech regulations like those found in the South Carolina Ethics Code only if it is "under the control of a candidate or the major purpose of which is the nomination or election of a candidate." *Buckley*, 424 U.S. at 79[ ].

Krawcheck II, 854 F. Supp. 2d at 342.

38. In short, while *Krawcheck I* and *Krawcheck II* struck down the Ethics Act's definition of "committee", neither precedent limited a state's ability to regulate political speech under the control of a candidate or for which the major purpose is the nomination or election of a candidate.

39. Turning back to the matter at hand, the Court concludes that neither *Krawcheck I* and *Krawcheck II*, nor the absence of a constitutional "committee" definition under the Ethics Act, has any bearing on the question here.

40. The Ethics Act regulates the conduct of the Senate Republican Caucus using the definition "legislative caucus committee" found at § 8-13-1300(21)(a). The constitutionality of this provision has not been litigated, nor does the Senate Republican Caucus challenge it here.

41. That decision is prudent as regulation of a "legislative caucus committee" appears to fall squarely *within* the bounds of permissible campaign regulation under *Buckley* and its progeny. This conclusion is bolstered by the Ethics Act itself.

42. For example, South Carolina Code § 8-13-1300(17), which defines what constitutes an "independent expenditure" under the Ethics Act also explains what expenditures are not independent as a matter of law: "Expenditures by party committees or expenditures by legislative caucus committees based upon party affiliation are considered to be controlled by, coordinated with, requested by, or made upon consultation with a candidate or an agent of a candidate." S.C. Code Ann. § 8-13-1300(17). So independent actors are freed from some of the regulatory obligations imposed by the Act by virtue of their independents, legislative caucus committees are presumptively under the control of a candidate and therefore subject to regulations tailored to address the concerns engendered in *Buckley*.

43. This conclusion comports with Senator Massey's testimony, which candidly acknowledged the Senate Republican Caucus's desire to influence the outcome of District 20's special election in favor of Mr. Dunn.

44. In light of the foregoing discussion, the Court finds *Krawcheck I* and *Krawcheck II* to have no adverse bearing on the $5,000 contribution limit imposed on a legislative party caucus by § 8-13-1316(A). To the contrary, the Senate Republican Caucus's political activity appears to fall well within the range of constitutionally permissible campaign finance regulations.

45. The Senate Republican Caucus also contends that, when read together, subsections (7) and (31) of § 8-13-1300 allow unlimited campaign spending on Mr. Dunn's behalf within the 45-day pre-election period. The Court disagrees.

46. This argument turns on what is not a "contribution," including, in relevant part:

> a gift, subscription, loan, guarantee upon which collection is made, forgiveness of a loan, an advance, in-kind contribution or expenditure, a deposit of money, or anything of value made to a committee, *other than a candidate committee*, and is used to pay for communications made not more than forty-five days before the election to influence the outcome of an elective office as defined in Section 8-13-1300(31)(c). These funds must be deposited in an account separate from a campaign account as required in Section 8-13-1312.

S.C. Code Ann. § 8-13-1300(7)(b) (emphasis added). Put differently, while the caucus is correct that certain in-kind contributions or expenditures made to a committee within a 45-day pre-election window are exempt from the definition of "contribution," that exception contains an exception that *excludes* in-kind contributions or expenditures made to "a candidate committee."[1]

47. The Court's review of § 8-13-1300(31), defining what it means to "influence the outcome of an elective office," fails to alter this conclusion as that subsection merely seeks to define regulatable political speech under the Act. Thus, while § 8-13-1300 enumerates certain conduct that constitutes "influence" over an election—including communications within the 45-day window as set forth in subsection (c)—there is no real dispute the caucus is attempting to influence the election. Instead, the issue here turns on whether the caucus's pre-election activity is a "contribution," which is resolved affirmatively under subsection (7)(b).

48. Here, the Senate Republican Caucus readily admits it is attempting to influence the outcome of the election in Mr. Dunn's favor. The relevant question is whether its efforts to do so are illegal in-kind contributions or expenditures in excess of § 8-13-1316(A). To the extent the caucus believes its in-kind contributions or expenditures on Mr. Dunn's behalf are exempted from the definition of "contribution," that conclusion is unsupported by a plain, unambiguous reading of § 8-13-1300(7)(b).

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[1] A "candidate" is defined by the Ethics Act as a person seeking election to a statewide or local office. S.C. Code Ann. § 8-13-1300(4). There is no dispute Mr. Dunn is a "candidate" within the meaning of the Act.

49. Finally, the Senate Republican Caucus argues its conduct has been condoned by a Senate Ethics Committee opinion, specifically Advisory Opinion 2007-1. The Court disagrees.

50. The Advisory Opinion purports to construe subsections (7) and (31) of § 8-13-1300 to explain the "45-day rule." The Advisory Opinion reads the 45-day rule to mean that communications made during the 45-day pre-election window must be reported as "expenditures" but are not "contributions" and "therefore, are not subject to the contribution limitations of the Ethics Act." S.C. Sen. Ethics Comm. Adv. Op. at 1 (July 23, 2017) (hereafter, "Adv. Op.").

51. Having reviewed the Advisory Opinion, the Court finds it unpersuasive for three reasons.

52. First, the Senate Ethics Committee's construction of a legislative enactment is entitled to no deference in this declaratory judgment action. The separation of powers doctrine grants the General Assembly the power to legislate, while reserving matters of statutory construction to the courts. *See Amisub of S.C., Inc. v. S.C. Dep't of Health & Envtl. Control*, 407 S.C. 583, 591, 757 S.E.2d 408, 412–13 (2014); *Hodges v. Rainey*, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000). The legislative ethics committees perform a different function.

53. Article III, §§ 11 and 12 of the South Carolina Constitution grants the General Assembly authority over the conduct of its members. *Gantt v. Selph*, 423 S.C. 333, 340, 814 S.E.2d 523, 527 (2018), reh'g denied (June 27, 2018).

54. To the extent the Senate Ethics Committee issued guidance indicating it would not bring an enforcement action against a member based on its interpretation of the Ethics Act, this Court has no role in reviewing that decision; however, that decision, and the reasoning underpinning that decision is neither binding nor persuasive with this Court in a declaratory judgment action such as this.

55. Second, the Court disagrees with the Advisory Opinion's conclusion, specifically:

> Because (31)(c) communications are specifically exempted from the definition of contribution, legislative caucus committees are not restricted by the $5,000 contribution limit found in Section 8-13-1316. Therefore, **a legislative caucus committee may spend any amount on (31)(c) communications within 45 days of an election.**

Ad. Op. at 2 (emphasis original). This reasoning is flawed.

56. Subsection (31)(c) simply defines one category of communications designed to "influence the outcome of an elective office"—it contains no express permission or restriction on legislative caucus committees. That limitation is expressly provided in § 8-13-1316(A).

57. Subsection (7), on the other hand, contains an express limitation on a "contribution" during the 45-day pre-election period by excluding in-kind contributions and expenditures to "a candidate committee" from the list of items that are *not* a contribution.

58. Moreover, neither subsection (7) or (31)(c) places any limitation on the clear, unambiguous limitation imposed by § 8-13-1316(A). Notably absent from the Advisory Opinion is an explanation connecting the definitional sections outlined above with the conclusion that § 8-13-1316(A).

59. Third, this Court does not find § 8-13-1316(A) to be ambiguous, therefore there is no need to construe the statute. Nevertheless, if statutory construction *was* warranted, the rules that govern that analysis all weigh against the reading adopted by the Advisory Opinion.

60. "What a legislature says in the text of a statute is considered the best evidence of the legislative intent or will. Therefore, the courts are bound to give effect to the expressed intent of the legislature." Rainey, 341 S.C. at 85, 533 S.E.2d at 581 (quoting Norman J. Singer, Sutherland Statutory Construction § 46.03 at 94 (5th ed. 1992)). As Senator Massey conceded

during his testimony, § 8-13-1316(A) is clear, unambiguous, and requires no special training to understand the restriction imposed. The Court agrees.

61. "Courts will reject a statutory interpretation which would lead to a result so plainly absurd that it could not have been intended by the legislature or would defeat the plain legislative intention." *Jones v. State Farm Mut. Auto. Ins. Co.*, 364 S.C. 222, 232, 612 S.E.2d 719, 724 (Ct. App. 2005) (citing *Unisun Ins. Co. v. Schmidt*, 339 S.C. 362, 529 S.E.2d 280 (2000); *Kiriakides v. United Artists Communications, Inc.*, 312 S.C. 271, 440 S.E.2d 364 (1994)). Senator Massey testified that in addition to the in-kind expenditures challenged by Plaintiff, the Senate Republican Caucus made a direct contribution of $5,000 to Mr. Dunn's campaign from each election cycle (*see also* Ex. 17 (check copies)). Asked to explain these direct contributions in excess of the $1,000 limit imposed by § 8-13-1314(A), he cited the first portion of § 8-13-1316 to authorize Mr. Dunn's campaign to accept $5,000 from the Senate Republican Caucus. But when asked why the latter part of that same statute, which expressly limits legislative caucus committee contributions to $5,000, he rejected the notion that it applied and referred to the statutes discussed above. The Court finds this explanation to strain credulity.

62. Finally, "[t]he general rule of statutory construction is that a specific statute prevails over a more general one." *State v. Taub*, 336 S.C. 310, 317, 519 S.E.2d 797, 801 (Ct. App. 1999) (citing *Wooten v. South Carolina Dep't of Transp.*, 333 S.C. 464, 511 S.E.2d 355 (1999); *Atlas Food Sys. & Serv., Inc. v. Crane*, 319 S.C. 556, 462 S.E.2d 858 (1995)). The Senate Republican Caucus's position frustrates this canon, asking the Court to find the specific limitation imposed by § 8-13-1316(A) is effectively preempted within the 45-day pre-election window based on a convoluted reading of § 8-13-1300(7) & (31). The Court finds such a reading untenable and declines to adopt that view.

63. In light of the foregoing, the Court concludes that Plaintiff is likely to prevail on the merits and, accordingly, is entitled to a preliminary injunction.

CONCLUSION

For the reasons set forth above, the Senate Republican Caucus is enjoined as set forth above. The preliminary injunction shall remain in place until dissolution, entry of final judgment, or further order of the Court.

AND IT IS SO ORDERED.

L. Casey Manning

The Honorable L. Casey Manning
Circuit Court Judge, Fifth Judicial Circuit

Date: Oct. 19, 2018.

Time: 3:00 p.m.

Columbia, South Carolina.